IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff,	§	
v.	§	Consolidated Lead No. H-01-3624
ENRON CORP., et al., Defendants.	§	
AMERICAN NATIONAL INSURANCE COMPANY, et al., Plaintiffs,	§	
vs.	§	Civil Action No. G-02-0299
J. P. MORGAN CHASE & COMPANY, Defendant.	§	

PLAINTIFFS AMERICAN NATIONAL INSURANCE COMPANY, et al's RESPONSE TO JPMORGAN CHASE & CO.'S MOTION TO DISMISS

Plaintiffs, American National Insurance Company, *et al.* ("American National"), subject to and without waiving their Motion to Remand, file this Response to JPMorgan Chase & Co.'s ("JPM") Motion to Dismiss (the "Motion"). For each of the reasons discussed herein, Defendant's Motion should be denied.

OVERVIEW

JPM asserts four grounds for dismissal pursuant to Rule 12(b)(6). Two are premised on SLUSA preemption, the other two rely upon the theory that a state court petitioner must

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comply with federal pleading standards. JPM's Motion to Dismiss should be denied because JPM fails to establish that either of these premises is correct. The thrust of JPM's Motion to Dismiss (and its Response to American National's Motion to Remand) is that American National's state law claims should be extinguished because there already exists a lawsuit asserting federal law causes of action based upon the same underlying factual scenario.

First, the Motion is premature and thus improvidently brought; a ruling on American National's Motion to Remand is a necessary prerequisite to determining the proper standards for analyzing JPM's request for dismissal. Second, JMP improperly seeks dismissal rather than a more definite pleading; dismissal of American National's state court petition with prejudice would violate American National's due process rights because the pleading requirements under Texas state law differ from federal standards. Third, even assuming JPM's Motion to Dismiss may properly be considered by the Court at this time, JPM fails to demonstrate that American National's action should be dismissed; dismissal of a plaintiff's claims under Rule 12(b)(6) is not favored and JPM does not meet its burden of demonstrating entitlement dismissal for failure to state a claim upon which relief may be granted.

CONSIDERATION OF A MOTION TO DISMISS IS PREMATURE AND IMPROPER

JPM's request for 12(b)(6) dismissal is premature because the Court has not yet ruled on American National's remand motion. It is well established that the initial question to be considered by a court is whether the court has jurisdiction to proceed. *See, e.g., Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574 (1999); *Clark v. Bever,* 139 U.S. 96 (1890). Where, as

here, the Court has before it both a motion to remand and another motion unrelated to jurisdiction, "the *first* question for the Court is always jurisdiction." *American National Ins. Co. v. Travelers Casualty & Surety Co.*, 8 F.Supp.2d 938, 939 (S.D. Tex. 1998) (emphasis in the original). *See also, e.g., Wilson v. Consolidated Rail Corp.*, 732 F.Supp. 954, 955 (S.D.N.Y. 1990) (the court had before it a motion to remand and a motion to dismiss for failure to state a claim; "because the court must be certain that federal jurisdiction is proper before entertaining a motion to dispose of the case on its merits, the remand motion is considered first.").

American National's Motion to Remand is currently pending before this Court. A motion to dismiss, accordingly, should not be considered until the Court has determined it has subject matter jurisdiction over the action. If the Court determines that federal subject matter jurisdiction exists, American National should be allowed to amend its pleadings to comport with federal standards, as discussed *infra.*

American National has, for obvious reasons, been hesitant to voluntarily amend it pleadings while its remand motion is pending. JPM contends that this Court has the right to join state court actions in federal court to create a SLUSA "covered class action" despite SLUSA's explicit reservation of such consolidation to the state courts. JPM's Motion to Dismiss also improperly equates American National's filing of a response to a motion filed by another defendant in the consolidated *Newby* action as American National's consent to be a party to the consolidated *Newby* action. *Motion* at 5. JPM, of course, fails to mention that

the American National response in question, expressly states that it was filed "subject to and without waiving its Motion to Remand.

In light of the allegations it already has made, JPM would undoubtedly claim that a voluntary amendment by American National to its pleading evidences American National's intent to "join" in the consolidated federal class action. American National, therefore, has reasonably declined to amend its pleadings absent Court order.

DISMISSAL OF AMERICAN NATIONAL'S STATE COURT PETITION UNDER EITHER RULE 9(B) OR RULE12(B)(6) IS IMPROPER

It is audacious and improper for JPM to demand dismissal, rather than a more definite statement, for American National's purported failure to meet federal pleading standards. American National filed its petition in state court where the requirements and procedures governing pleadings differ significantly from those that apply to pleadings in federal court.

Under Texas law, pleadings are sufficient if they give fair notice of a party's claim. *See Roark v. Allen,* 633 S.W.2d 804 (Tex. 1982). The Texas Rules of Civil Procedure provide:

> That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole.

Tex. R. Civ. P. 45(b). Thus, the fact that allegations are conclusive in nature or lacking in detail does not invalidate them; it only gives rise to an obligation, on special exception, to give more details. *Atkinson v. Thompson,* 311 S.W.2d 250, 255 (Tex. Civ. App. – Houston 1958, writ ref'd n.r.e.).

Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure have no counterparts in the Texas procedural rules. In Texas courts, the complaining party is required to specify and request cure of pleading defects by special exception. Tex. R. Civ. P. 91. The party asserting the claim or counterclaim then has the opportunity to amend its pleadings to correct any defects. *See Atkinson, supra.* It plainly would be unfair and improper to dismiss American National's state law petition without first allowing American National to amend its pleading. Because JPM's improperly seeks dismissal instead of a more definite statement, its Motion to Dismiss should be denied.

AMERICAN NATIONAL'S PETITION, IN ANY EVENT, SURVIVES A 12(B)(6) MOTION TO DISMISS

It is important to reiterate that this case was filed in state court; asserts only state law causes of action; was pled to meet state court requirements and ought to be remanded to state court. Under Defendant's theory, Plaintiffs' petition must meet federal pleading requirements which were not required or anticipated at the time the pleading was filed in state court.

Assuming, *arguendo,* that American National had initially brought its state law claims in federal court such that consideration of JPM's Rule 12(b)(6) motion might be appropriate at this time, the Motion should be denied because JPM fails to meet its burden of demonstrating entitlement to dismissal for failure to state a claim upon which relief may be granted. A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.*

Gibson, 355 U.S. 41, 45-46 (1957). "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales, inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim in federal court and calls for a "short and plaint statement of the claim showing that the pleader is entitled to relief." *See Thrift v. Hubbard,* 44 F.3d 348, 356 n.13 (5th Cir. 1995). "The Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." *Auster Oil & Gas v. Stream,* 764 F.2d 381, 386 (5th Cir. 1985).

The repeated accusation that American National has not pled facts with sufficient particularity is a central theme of JPM's Motion to Dismiss. The reason for this purported failure, however, is obvious: JPM is in possession of the information concerning the complained-of conduct and no discovery has been undertaken.

It is well-established that Rule 9(b)'s particularity requirement may be relaxed where the information is only within the opposing party's knowledge. *Wool v. Tandem Computers, Inc.*, 818 F.2d. 1433, 1439 (9th Cir. 1987); *Schilk v. Penn-Dixie Cement Corp.*, 507 F.2d. 374, 379 (2d Cir. 1974), *cert. denied*, 95 S.Ct. 1976 (1975). "If the information surrounding the allegations is peculiarly within the knowledge of the defendant, less detail is required in the complaint." *The Cadle Co. v. Schultz,* 779 F.Supp. 392 (N.D. Tex. 1991). "It is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim

through evidence unturned in discovery. Rule 9(b) does not require omniscience; rather, the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim." *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 680 (6th Cir. 1988).

To survive a motion to dismiss, "the complaint must either contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir. 1995). American National's petition alleges sufficient facts to put JPM on notice of the complained-of conduct and contains allegations sufficient for inferring that evidence on material points will be uncovered during discovery for presentation at trial.

Even if the Court were to find that American National's pleading were lacking in detail, requiring a more definite statement of facts, rather than dismissing the claims, would be appropriate. As a rule, dismissal under Rule 9(b) is an abuse of discretion unless the plaintiff is afforded the opportunity to cure the pleadings. *See Luce v. Edelstein,* 802 F.2d 49, 56-57 (2d Cir. 1986); *McInnis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 706 F.Supp. 1355, 1361 (M.D. Tenn. 1989).

That a plaintiff should be provided an opportunity to re-plead is confirmed by the case JPM cites in support of its proposition that American National's claims should be dismissed. *See Motion* at 10 (citing *Lovelace v.Software Spectrum, Inc.,* 78 F.3d 1015, 1018 (5th Cir.

1996)). In *Lovelace*, the court order allowed the plaintiffs twenty days to re-plead their claims. *Lovelace*, 78 F.3d at 1017. Only after the twenty-day period passed without the plaintiffs re-pleading the claims did the district court enter judgment dismissing the claims pursuant to Rule 9(b). *Id.*

PLAINTIFFS' PETITION SETS FORTH ALL THE REQUIRED ELEMENTS

Defendant JPM seeks to avoid liability by attacking the proverbial "straw man" - boldly stating that "*First,* the [Plaintiffs'] Petition does not allege the existence of any fiduciary or confidential relationship between Plaintiffs and JPMorgan Chase. The Petition contains not a single allegation of any agreement between Plaintiffs and JPMorgan Chase." Motion to Dismiss at 11-12. Defendant JPM continues in its second, third and fourth points to argue that Plaintiffs did not plead any facts to create a duty to disclose on behalf of JPM.

Defendant's argument ignores their significant liability for violating the Texas Securities Act. Under TEX. REV. CIV. STAT. ANN. Art. 581-33 F § 2 (Texas Blue Sky Law). As an aider and abettor, Defendant JPM is liable even absent any fiduciary or other independent duty to disclose. In *Frank v. Bear Stearns*, the 14th Court of Appeals, analyzing the very statute at issue, found that:

> In order to establish liability under this standard, a plaintiff must demonstrate 1) that a primary violation of the securities laws occurred; 2) that the alleged aider "had general awareness" of its role in this violation; and 4) that the alleged aider either a) intended to deceive plaintiff or 2) acted with reckless disregard for the truth of the representations made by the primary violator.

Frank v. Bear Stearns & Co., 11 S.W.3d 380, 384 (Tex. App. – Houston [14th Dist.] 2000, *rev. denied.* Of the numerous elements required to prove aider and abettor liability, the existence of a fiduciary relationship or other duty to disclose is conspicuously absent. Plaintiffs' Petition clearly sets forth each of the elements required to maintain a cause of action under the Texas Blue Sky law in (by way of example and not limitation) paragraphs 18, 44, 45, 46, 47, 49, and 50-54.

Defendant JPM also argues that "Plaintiffs have not alleged (and cannot allege) actual reliance on any statements or omissions by JPMorgan Chase." Motion at 13. American National clearly alleges (and can prove) reliance in its Petition. American National states in its Petition at ¶18 that "These misleading statements, made possible with the help of Defendant Morgan's company Mahonia, Ltd., were relied upon by Plaintiffs in their purchase of Enron stock, bonds, preferred stock, commercial paper and other securities." In paragraph 57, American National explains "Such false representations were made for the purpose of inducing Plaintiffs to enter into contracts for the purchase and sale of the Enron securities in question. Such false representations were relied upon by Plaintiffs in entering into such contracts." Clearly, American National's Petition sets forth the necessary and key elements to each of their causes of action.

PRAYER

American National prays that the JPM's Motion to Dismiss be denied with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on all counsel via email and also on counsel for J.P Morgan Chase & Company via U.S. mail on July 3, 2002.

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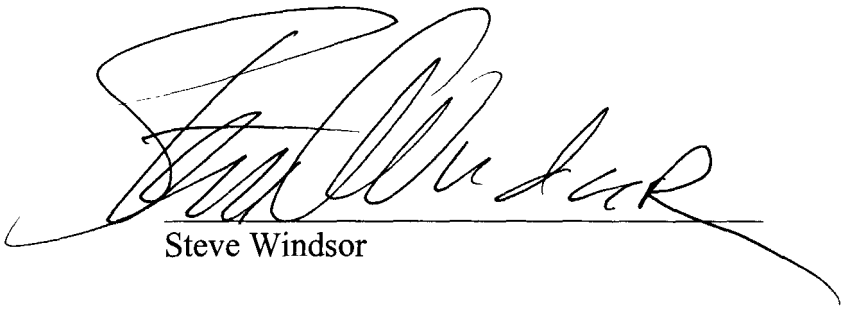

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ORDER

Before the Court is Defendant JPMorgan Chase & Company's Motion to Dismiss Plaintiffs' (American National Insurance Company, *et al.*) Original Petition. The Court has considered the pleadings and the argument of counsel, and finds that the Motion does not have merit.

It is, therefore, the ORDER of the Court that Defendant JPMorgan Chase & Company's Motion to Dismiss Plaintiffs' Original Petition is hereby DENIED.

DONE this _____ day of _____, 2002.

_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE